IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 95 of 1998
WITH
CRIMINAL REVISION APPLICATION NO. 54 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

CHHABILDAS MULCHANDBHAI SURTI

Versus

STATE OF GUJARAT

Appearance:

MR NIRUPAM NANAVATI with MR BK OZA,L.A. for M/s.NANAVATY ADVOCATES for Petitioner

MR SP DAVE, LD. APP for Respondent

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 18/04/98

ORAL JUDGEMENT

1. Both the aforesaid proceedings were placed together before this Court in view of the fact that the same have been connected proceedings. By consent they have been taken up for final hearing and disposal today before this Court. Accordingly in Criminal Revision Application No. 54 of 1998 RULE is issued. Service of rule is waived by Mr. S.P. Dave, Ld. A.P.P. for the State.

2. Chhabildas Mulchandbhai Surti, petitioner in Criminal Revision Application No. 54 of 1998 and appellant in Criminal Appeal No. 95 of 1998 has been facing trial for the offences punishable u/Ss. 7(13)(1)(g) and 13 (2) of the Prevention of Corruption Act, 1988 in Special Case No. 9 of 1990 pending before the Ld. Addl. Sessions and Special Judge, Valsad at Navsari. The special case was listed for evidence on 23/12/1997 and 24/12/1997, but since the petitioner was ill his learned advocate applied for adjournment while producing with the application for adjournment medical certificate in respect of the illness of the accused. The Ld. Addl. Sessions Judge did not grant the application for adjournment and issued non-bailable warrant. Before the warrant could be served the accused moved an application exh. 14 in the aforesaid special case on 30/12/1997 for cancelling the non-bailable warrant and for enlarging the accused on bail. The Ld. Special Judge, Valsad at Navsari by his order dated 30/12/1997 directed enforcement of the non-bailable warrant and production of the accused before the Court on 7/1/1998 while rejecting the application. This order has been challenged by the accused in Criminal Revision Application No. 54 of 1998. It appears that before the Revision Application was filed, the accused also moved a fresh application for bail on 3/1/1998 after he was taken in judicial custody, in asmuch as one of the grounds for rejecting earlier application was that the accused was not in custody and, therefore, his prayer for bail, then, was not entertainable. The Ld. Special Judge by his order dated 7/1/1998 in the bail application dated 3/1/1998 in Misc. Bail Application No. 7/98 granted bail in the sum of Rs.10,000/-. But while granting the bail be directed the accused to pay penalty of Rs.4,000/and if the penalty was not paid, to take the accused in custody for undergoing simple imprisonment for a period of 30 days. The endorsement below the order indicates that the accused deposited the amount of Rs.4,000/- in the Court on 7/1/1998 itself. Now this order of penalty has been subjected to challenge in this appeal u/S. 449 read with sec. 374 of the Code of Criminal Procedure, 1973 (II of 1974) (for short 'the Code') on number of grounds inter-alia on the ground that the impugned order of penalty is uncalled for, unwarranted, illegal and in violation of natural justice.

3. I have heard the learned advocates appearing for the petitioner/appellant herein. It has been fairly conceded on behalf of the petitioner/appellant that the Criminal Revision Application will not survive in view of the fact that a fresh bail application was moved by the

accused. Hence, without expressing any opinion on the merits of the case with regard to what transpired before 3/1/1998 when the accused preferred second bail application, which was granted by the Ld. Special Judge as per order dated 7/1/1998 impugned in the appeal , the Criminal Revision Application will have to be disposed of as not surviving. The merits of the appeal are now required to be considered.

4. The provision contained in sec. 446 of the Code has been read before this Court. It is apparent on the face of the record that the Ld. Special Judge has not followed the procedure as laid down under this provision. No notice appears to have been issued against the appellant for imposition of penalty in respect of alleged breach of earlier bail bond. There is nothing on the record to show that the earlier bail bond was forfeited. What has been done by the Ld. Special Judge is to issue non-bailable warrant and to take the appellant in judicial custody. However, it does not appear from the impugned order that the Ld. Judge directed forfeiture of the bond on account of breach thereof. That apart, it is clearly apparent on the face of the impugned order itself that the accused was not under a notice as required u/S. 446 of the Code for imposition of penalty. Such a notice is necessary as can be seen from the provision itself. If necessary, reference may be made to Gulam Mehdi v. State of Rajasthan reported in AIR 1960 SC 1185 where the Apex Court considering the provision of section 514 of the Code of Criminal Procedure, 1898, which provided for the procedure regarding imposition of penalty upon non-complaince of bond, observed that before a surety would become liable to pay the amount of the bond it would be necessary to give notice why the amount should not be paid and upon failure to show cause only the Court could proceed to recover money. The Apex Court held that in absence of such an opportunity having been given to a surety the proceedings could not be said to be in accordance with law and should therefore be quashed. Section 446 of the Code corresponds to the provision of section 514 of the Old Code in so far as issuance of notice is concerned. The provision of section 446 might be reproduced :-

"446. Procedure when bond has been forfeited.-

(1) Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited,

or where, in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited,

The Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid.

Explanation- A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, before any Court to which the case may subsequently be transferred.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code :

Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.

(3) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(4) xxx xxx xxx xxx xxx

(5) xxx xxx xxx xxx xxx"

On a plain reading of the aforesaid provision it can be seen that issuance of notice for showing cause clearly appears to be a minimum requirement for imposition of penalty and even if it is assumed that the accused was under a personal bond and even if it is assumed that such a personal bond came to be forfeited by the Ld. Special Judge, notice to show cause for imposition of penalty ought to be given to the accused or the surety as the case may be, under the aforesaid provision before penalty is actually imposed. In the present case it clearly

appears that the procedure u/S. 446 has not been followed, atleast with regard to calling upon the accused to show cause why the penalty should not be imposed. In that view of the matter, impugned order to the extent that the accused has been saddled with penalty of Rs.4,000/- in default to undergo simple imprisonment of 30 days is clearly appears to be contrary to law. Hence, the same deserves to be quashed and set aside. Following order is therefore, passed :-

The impugned order of payment of penalty of Rs.4,000/- is hereby quashed and set aside and the amount of penalty of Rs.4,000/- deposited/paid by the accused shall be refunded to the accused after due verification. Rest of the order of bail as also the undertaking contained in application dated 3/1/1998 for remaining present before the Court shall stand. Criminal Appeal No. 95 of 1998 shall accordingly stand allowed. In so far as Criminal Revision Application No. 54 of 1998 is concerned, rule is discharged, since the same will not survive as stated above.

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PVR cr.a9598j.